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In the Supreme Court of the United States

OCTOBER TERM, 1975

GARLAND M. FITZPATRICK, ET AL., PETITIONERS

v.

FREDERICK BITZER, ET AL.

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v.

DONALD MATTHEWS, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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INTEREST OF THE UNITED STATES

The United States has equal employment opportunity enforcement responsibility under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, *et seq.*, as amended, 42 U.S.C. 2000e, *et seq.* In particular, the Attorney General has authority under Sections 706(f) and 707 of the Act, 42 U.S.C. (Supp. III) 2000e-5(f) and 2000e-6, to bring civil actions against state and local governments and governmental agencies which have allegedly engaged in unlawful employment practices. The decision of the court of appeals, insofar as it held that awards of retroactive benefits against state governments, in suits by private individuals, are barred by the Eleventh Amendment, will substantially affect the Attorney General's enforcement responsibilities.

QUESTIONS PRESENTED

1. Whether, in a suit under Title VII of the Civil Rights Act of 1964 by private individuals against state officials, the Eleventh Amendment bars an award of retroactive benefits to compensate the victims of unlawful employment practices for the financial injury suffered by them.

2. Whether, if the private plaintiffs prevail in such a suit, the Eleventh Amendment bars an award to them of reasonable attorneys' fees as a part of the costs.

STATEMENT

Petitioners,[1] male present and former employees of the State of Connecticut, brought this action in the United States District Court for the District of Connecticut, alleging that the state's statutory scheme for the retirement of its employees discriminated against men on account of their sex. The district court held that the state's retirement plan violates Title VII's prohibition against discrimination in employment on account of sex (Cross-Pet. App. 2a-25a). The court enjoined the state officials (cross-petitioners here) from continuing to operate the state's retirement scheme in a sexually discriminatory manner (*id.* at 24a), but it denied petitioners' requests for an award of retroactive retirement benefits, to compensate them for financial losses suffered as a result of the state's discriminatory practices, and for an award of reasonable attorneys' fees as a part of the costs (*id.* at 20a-23a). The court reasoned that, although the statute expressly authorizes both the monetary relief requested and awards of attorneys' fees (42 U.S.C. (Supp. III) 2000e-5(g) and 42 U.S.C. 2000e-5(k)), the Eleventh Amendment, as interpreted by this Court in *Edelman* v. *Jordan*, 415 U.S. 651, and other cases, "remains a jurisdictional barrier to the payment of the retroactive monetary relief

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[1] For convenience, we refer to the petitioners in No. 75-251 —the plaintiffs below—as "petitioners," and to the respondents in No. 75-251 as "cross-petitioners." References to the "petition" are to the petition filed in No. 75-251, and references to the "cross-petition" are to the petition filed in No. 75-283.

requested * * * [and] precludes the award of attorneys' fees" (Cross-Pet. App. 23a).

On petitioners' appeal,[2] the court of appeals affirmed in part and reversed and remanded in part (Pet. App. 1a-24a). It held that, although Congress intended to authorize the district courts to award back pay or other retroactive monetary relief against states in actions brought by private individuals under Title VII (*id.* at 14a-17a), such relief is barred by the Eleventh Amendment (*id.* at 17a-23a). The court ruled that the power of Congress to enforce the Fourteenth Amendment does not include the power to subject the states to "a private federal action for retroactive damages" (*id.* at 19a), at least when "Congress * * * has at its disposal various methods other than private federal damage suits for enforcing Fourteenth Amendment rights" (*id.* at 20a).

DISCUSSION

The petition and the cross-petition present important constitutional questions that should be resolved by this Court.

1. The availability in private actions of back pay or other monetary relief designed to compensate the victims of unlawful employment discrimination for the financial injury they suffered as a consequence of the discrimination is a crucial element of Title VII's remedial scheme. As this Court stated in *Albemarle Paper Co.* v. *Moody*, No. 74-389, decided June

[2] The state officials did not appeal.

25, 1975, "[i]f employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality" (slip op. 11). Moreover, "the private right of action remains an essential means of obtaining judicial enforcement of Title VII" (*Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 45).

The holding of the court of appeals that states are insulated from such monetary relief at the instance of private plaintiffs would significantly affect the Act's enforcement scheme and would undermine "[t]he 'make whole' purpose of Title VII" (*Albemarle Paper Co.* v. *Moody*, *supra*, slip op. 12). In our view, that holding is incorrect. Having empowered Congress by the Fourteenth Amendment to enforce the provisions of that Amendment by appropriate means, "the States necessarily surrendered any portion of their sovereignty that would stand in the way" of such enforcement. *Parden* v. *Terminal Railway*, 377 U.S. 184, 192.[3]

2. The attorneys' fee issue presented by the cross-petition was, in our view, decided correctly by the court of appeals. Section 706(k) of the Act expressly authorizes the district courts to "allow the prevailing party * * * a reasonable attorney's fee as part of

[3] The Court was not presented in *Edelman* v. *Jordan*, 415 U.S. 651, with the question "whether the States' Eleventh Amendment sovereign immunity may have been limited by the later enactment of the Fourteenth Amendment to the extent that such a limitation is necessary to effectuate the purposes of that Amendment" (415 U.S. at 694, n. 2, dissenting opinion of Mr. Justice Marshall).

the costs * * *." Indeed, in order to vindicate the "strong public interest in having injunctive actions brought under Title VII, to eradicate discriminatory employment practices" (*Albemarle Paper Co.* v. *Moody, supra,* slip op. 8), attorneys' fees should be awarded to the prevailing party except in "special circumstances" when such an award would be inappropriate or unnecessary. See *ibid.*; cf. *Newman* v. *Piggie Park Enterprises,* 390 U.S. 400.[4]

Even if it is assumed that monetary relief against the state officials in this case is precluded by the Eleventh Amendment, an award of attorneys' fees incident to the prospective injunctive relief ordered by the district court would have only an ancillary impact on the state treasury and would not offend the Eleventh Amendment. Such an award is not "measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials" (*Edelman* v. *Jordan, supra,* 415 U.S. at 668) but is a permissible consequence of the litigation itself. Cf. *Fairmont Creamery Co.* v. *Minnesota,* 275 U.S. 70, 74-75.

As this Court recognized in *Alyeska Pipeline, supra,* 421 U.S. at 269-270, n. 44, and as the court of appeals in this case acknowledged (Pet. App. 24a), the courts of appeals are divided on the question

[4] This is an instance in which "Congress has opted to rely heavily on private enforcement to implement public policy and to allow counsel fees so as to encourage private litigation" (*Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240, 263).

whether an award of attorneys' fees against state officials is permissible under the Eleventh Amendment. Because of the importance of that question to the enforcement of Title VII, and because of its close relationship to the monetary relief question presented by the petition, we believe that the cross-petition should also be granted.

CONCLUSION

The petition and the cross-petition for a writ of certiorari should be granted.

Respectfully submitted.

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